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November 17, 2023

By ECF

Honorable Laura Taylor Swain
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007-1312

Re: Nunez v. City of New York, 11 Civ. 5845 (LTS)

Dear Judge Swain:

We write on behalf of the Plaintiff Class. Pursuant to Section 5(b)(ii) of the Court's Individual Rules of Practice, and paragraph 8 of the Amended Protective Order Concerning Confidential Information, Dkt. 89 (the "Amended Protective Order"), we write to request permission to file under seal **Exhibits 1, 3-14, 17-33** to the Declaration of Mary Lynne Werlwas dated November 17, 2023, which are also listed in the table below. We are also filing **Exhibits 35-42** under seal as Defendants requested, but do not believe that blanket sealing of these exhibits is justified under *Lugosch v. Pyramid Co. of Onandaga*, 435 F. 3d 110 (2d Cir. 2006). Finally, we seek permission to file publicly **Plaintiffs' Memorandum of Law in support of its Motion for Contempt and Application for a Receiver and Plaintiffs' Proposed Findings of Fact** with redactions where those documents discuss content that is exclusively contained in the Exhibits filed under seal. We are contemporaneously filing under seal unredacted versions of the Memorandum of Law and the Proposed Findings of Fact showing in highlight the text that has been redacted from the publicly-filed versions of these documents.

These Exhibits were produced by Defendants with the designation of Confidential or Attorneys' Eyes Only. Defendants confirmed by email dated November 15, 2023 that they requested all of these Exhibits to be filed under seal. Pursuant to the Court's individual rules, we informed Defendants that, within three days of the filing of this letter, they must submit their own letter explaining the need for filing these exhibits under seal. Section 5(b)(ii).

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Plaintiffs take no position on whether **Exhibits 1, 3-14, 17-33** should remain under seal.

Exhibits 35-42, however, do not meet the high standard for sealing under *Lugosch*. **Exhibit 35** consists of Investigation Division findings and reports on use of force incidents that were reported to Plaintiffs in documents called “CMS Preliminary Review Reports” for March, April, May, July, and August 2023. **Exhibits 36-42** consist of more comprehensive Investigation Division files for certain use of force incidents as well as a report to the Central Operations Desk (“COD”) regarding an incident.

As these exhibits are being submitted in support of the Plaintiffs’ motion for contempt and for appointment of a receiver, they are judicial documents and entitled to a presumption of public access under the First Amendment. *See Lugosch*, 435 F.3d at 119; *U.S. v. Erie Cnty.*, 763 F. 3d 235, 242 (2d Cir. 2014) (quoting *Pell v. Procunier*, 417 U.S. 817, 830 n. 7 (1974)) (higher First Amendment right of access applies to these documents because the “conditions in this Nation’s prisons are a matter that is both newsworthy and of great importance.”).

Defendants cannot rely on the Amended Protective Order alone to justify sealing of these exhibits. *Bionpharma Inc. v. CoreRx, Inc.*, 2013 WL 2977998, at * 1 (S.D.N.Y. Mar. 6, 2023). Further, Defendants cannot show that sealing of the documents in their entirety is “necessary to preserve higher values” and that redactions are insufficient for that purpose. *Lugosch*, 435 F. 3d at 126.

The Investigation Division and COD reports and files contain critical information supporting Plaintiffs’ contentions that the City has not complied with this Court’s orders, as they describe the Department’s own findings and reporting on use of force and other incidents occurring in the jails. **Exhibit 35** consists of the substantive ID report in several Intake Investigations, which are relatively brief investigations ID conducts of every use of force incident. It includes a review of staff and witness reports, video footage, documentation of serious injuries, and any disciplinary action taken in response. The Intake Investigations are reported to the Plaintiff Class in a spreadsheet called “CMS Preliminary Reviews.” The documents in **Exhibits 36-42** are Investigations Division files for use of force incidents, including witness statements, summaries of the use of force incident, and documentation of injuries. Because timely and objective investigations are a critical component of this Court’s orders, and the underlying facts of use of force incidents are even more so, these ID files are important to understand the Department’s non-compliance. There is also a single report to COD of an incident that occurred in the Department.

Public access to these exhibits is critical to understanding the conditions and conduct that occurs in Defendants’ jails. The descriptions of use of force incidents contained in these exhibits go beyond the summaries contained in Monitor’s reports and illustrate in graphic detail the violence experienced by those confined in the jails. They are important evidence in “enabl[ing] the public to decide whether the Court and the parties...are doing their jobs in fulfilling the terms of the [Consent Judgment].” *Erie Cnty.*, 763 F. 3d at 242.

To address any privacy interests in the personal information contained in the documents,

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Plaintiffs proposed that the exhibits be filed publicly, but with narrowly tailored redactions of the names of incarcerated individuals and identifying numbers, names of Department of Corrections staff and badge numbers, and camera names and angles. *See Lugosch*, 435 F. 3d at 120.¹ Defendants did not agree.

Defendants will not be able to justify sealing of these exhibits in their entirety. With the appropriate redactions, these documents will not reveal any confidential or sensitive information about the layout of the jails, specifics about facility operations beyond what is already available publicly through the Monitor's reports, or other personal information. We ask the Court for permission to (1) file **Exhibits 35-42** publicly with the narrowly tailored redactions identified above; and (2) re-file **Plaintiffs' Memorandum of Law in support of its Motion for Contempt and Application for a Receiver and Plaintiffs' Proposed Findings of Fact** without redactions of the content relating to **Exhibits 35-42**.

We thank the Court for its attention to these matters.

THE LEGAL AID SOCIETY

/s/

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¹ Courts have held that redaction of identifying information is a narrowly tailored approach to preserve "higher values of witness safety and judicial efficiency." *Sec. & Exchn. Comm'n v. Ripple Labs.*, 2022 WL 17751466 at * 2 (S.D.N.Y. Dec. 19, 2022).

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Exhibits to Be Filed Under Seal

1	Directive 5006R-D, Use of Force
3	Directive 7504R-A, Suspension from Duty and/or Placement on Modified Assignment
4	Operations Order 01/23 re Tour Wands
5	Operations Order 11/17 re: Watch Tour System
6	Memorandum #14/23 re: Watch Tour Compliance/Discipline
7	Operations Order 24/16 re: Special Unit Assignments
8	Operations Order 25/19 re: Facility Response Teams
9	Teletype Order No. HQ-00944-0 re: Supervisor Tours and Responsibilities
10	Teletype Order No. HQ-02948-1 re: Supervisor Tours and Responsibilities
11	Memorandum from Louis Molina, Commissioner, to DOC leadership re: Decreasing Violence at RNDC, Feb. 22, 2022
12	Memorandum from Louis Molina, Commissioner, to Steve J. Martin, Monitor, re: NYC DOC RNDC Emergency Response Plan, Apr. 14, 2022
13	Memorandum from Christopher Miller, Deputy Commissioner, to Louis Molina, Commissioner re: GRVC Proposed Schedule, Oct. 11, 2022
14	Security Memo 067/21 re Slashing/Stabbings at RNDC
17	Full NCU Audit- AMKC, Quad 12 Lower Review, December 22, 2021
18	Full NCU Audit - OBCC, 3 South and 3 Southwest Review, February 20, 2022
19	Full NCU Audit- GRVC, Building 10B Review, March 3, 2022
20	Full NCU Audit- NIC, Dorm 5 North, April 4, 2022
21	Full NCU Audit- OBCC, 2 Upper Review, May 5, 2022
22	Full NCU Audit- EMTC Building 4 Main Review, August 8, 2022
23	Full NCU Audit- RNDC 2 Upper South Review, February 21, 2023
24	Full NCU Audit- AMKC Quad Upper 13 Review, April 6, 2023
25	Full NCU Audit- GRVC 9A, May 7, 2023
26	Full NCU Audit- EMTC 9 Lower Review, June 25, 2023
27	Full NCU Audit- RNDC 3 Lower South, August 15, 2023
28	Facility Responses to NCU Security Audits
29	Index of NCU's COD Assessments
30	NCU's COD Assessments from 2022 and 2023
31	Facility Responses to NCU's COD Assessments
32	Summary of Case Involving Assistant Commissioner

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33	DOC 16 th Compliance Report + Appendices
35*	Excerpts from CMS Preliminary Review Reports for March, April, May, July, and August 2023
36*	ID Packet for UOF 1069/23
37*	ID Packet for UOF 1156/23
38*	ID Packet for UOF 1703/23
39*	Report for COD 1779/23
40*	ID Report from ID Packet for UOF 2062/23
41*	ID Packet for UOF 2893/23
42*	ID Packet for UOF 2239/23

*Plaintiffs seek permission to file Exhibits 35-42 publicly with minimal redactions.